

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CAMERON PIERCE and PATRICIA PIERCE, husband and wife; KAREN KIRBY, a single woman; GREGORY SHERMAN and PAULA SHERMAN, husband and wife, MICHAEL LEPAGE and GERTRUDE LEPAGE, husband and wife; LARRY BROWN, a single man; and RALPH MARTINELLI, a single man, on behalf of themselves and a class of similarly situated individuals.

## Plaintiffs.

V.

NOVASTAR MORTGAGE, INC., a foreign corporation,

Defendant.

CASE NO. C05-5835RJB

ORDER GRANTING  
PLAINTIFFS' MOTION FOR (1)  
PRELIMINARY APPROVAL OF  
THE SETTLEMENT, (2)  
APPROVAL OF CLASS NOTICE,  
AND (3) A HEARING DATE  
FOR FINAL APPROVAL OF  
SETTLEMENT

This matter comes before the Court on Plaintiffs' Motion for (1) Preliminary Approval of the Settlement, (2) Approval of Class Notice, and (3) a Hearing Date for Final Approval of Settlement (Dkt. 260). The Court has considered pleadings filed in support of and response to the motion and the remainder of the file herein.

ORDER  
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## **I. BACKGROUND AND DISCUSSION**

The class plaintiffs are all borrowers who engaged in loan transactions with NovaStar Mortgage, Inc. (“NovaStar Mortgage”) and claim to have been deceived by NovaStar Mortgage’s failure to adequately disclose its payments to brokers on good faith estimates. Some of these payments are “yield spread premiums,” which the plaintiffs allege are paid by lenders to brokers as an incentive to induce borrowers to enter into mortgages with higher interest rates. Dkt. 25 at 4, Dkt. 37 at 2. The plaintiffs brought suit alleging that the failure to provide written disclosure of broker payments resulted in higher interest rates on their loans and violated Washington’s Consumer Protection Act (“CPA”), RCW 19.86 *et seq.* The Court certified a class in this matter on October 31, 2006. Dkt. 74. On April 19, 2007, the Court amended the class definition to read as follows:

- (1) You entered into a federally-regulated mortgage loan that was subject to the requirements of Washington law and secured by property within the State of Washington, at any time from December 30, 2001, to the present;
- (2) NovaStar paid money to your mortgage broker (“Payment”) in return for negotiating a higher interest loan for you;
- (3) Neither NovaStar nor the broker adequately disclosed to you the Payment on a good faith estimate dated no later than three days after the date on which NovaStar received the loan application or, if your application was received fewer than three days before you signed final loan documents, the date on which you signed final loan documents; and
- (4) You paid the mortgage broker compensation in the form of an “origination fee” or “broker fee” in addition to the Payment that NovaStar paid to the broker.

Dkt. 177 at 9-10.

Trial in this matter was scheduled to commence on June 11, 2007. Dkt. 183. The deadline for requests to opt out of the class was June 4, 2007. Dkt. 178 at 3. On June 5, 2007, the parties informed the Court of their agreement to strike the trial date. Dkt. 255. The plaintiffs inform the Court that the parties have reached a settlement and seek preliminary approval of the settlement. Dkt. 260. To date, Karen Kirby and Gregory Sherman, class representatives, have

## ORDER

1 not yet signed the Settlement Agreement and General Release. *See* Dkt. 261 at 14-20. Class  
2 counsel are awaiting Mr. Sherman's signature, and Ms. Kirby has indicated that she will sign the  
3 Settlement Agreement and General Release. Dkt. 261 at 2.

4 The plaintiffs also seek approval of class notice of the settlement and ask the Court to  
5 schedule a fairness hearing for consideration of whether to grant final approval of the settlement  
6 and approve Class Counsel's anticipated application for an award of attorney's fees. Dkt. 260.  
7 The motion is not stipulated and was filed on behalf of the plaintiffs. Counsel for the defendant  
8 filed a response indicating that "NovaStar [Mortgage] does not oppose plaintiffs' motion" and  
9 clarifying NovaStar Mortgage's position as to the merits of the underlying claims and  
10 allegations. Dkt. 263 at 1.

11 The proposed settlement is based upon class members' increased interest payments  
12 associated with NovaStar Mortgage's payments to brokers and represents. Dkt. 260 at 3. The  
13 award excludes class counsel's litigation costs of \$85,654.78. Dkt. 262 at 2. The award also  
14 excludes \$22,500, which is the sum of incentive payments of \$4,500 per married couple class  
15 representative and \$3,000 per unmarried class representative. *Id.* Including prejudgment  
16 interest, the proposed settlement represents 85% of the class members' damages. *Id.* at 3.  
17 Individual class members' recoveries would range from \$67 to \$19,618. *Id.* at 4. With respect  
18 to class representatives Michael and Gertrude LePage, NovaStar Mortgage and the LePages  
19 will execute a modification agreement whereby the LePages' loan rate will be 7.875%. Dkt. 261  
20 at 10.

21 Under the proposed settlement, NovaStar Mortgage will pay up to \$75,000 of notice  
22 and administrative costs pending final approval and administration of the settlement, and the  
23 remainder will be paid either by the class or by class counsel. Dkt. 261 at 6.  
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1 Attorneys fees were negotiated separately from negotiation of the class' recovery and  
 2 would not impact the class' recovery. Dkt. 260 at 4. Class counsel will move separately to seek  
 3 \$1.8 million in attorneys fees. *Id.* at 4.

4 The Class Settlement Fund and the attorneys fee award will accrue interest at the federal  
 5 post-judgment interest rate beginning September 12, 2007, and ending upon payment by  
 6 NovaStar Mortgage. Dkt. 261 at 9. NovaStar Mortgage's payment of post-judgment interest is  
 7 not to exceed \$125,000. *Id.*

8 As required by Federal Rule 23(e)(2), class counsel inform the Court that they have not  
 9 entered into any other agreements in connection with the proposed settlement. Dkt. 261 at 2.

10 **II. DISCUSSION**

11 Unlike the settlement of most private civil actions, class actions settlements require court  
 12 approval. Fed. R. Civ. P. 23(e)(1)(A) ("The court must approve any settlement, voluntary  
 13 dismissal, or compromise of the claims, issues, or defenses of a certified class.). Courts are  
 14 primarily concerned with the protection of class members whose rights may not have been given  
 15 due regard by the negotiating parties, including the named plaintiffs. *Officers for Justice v. Civil*  
 16 *Service Com'n of City and County*, 688 F.2d 615, 624 (9th Cir. 1982).

17 The protection afforded by Federal Rule 23(e) is primarily procedural in nature,  
 18 requiring class notice of the proposed settlement; approval only after a hearing and a finding  
 19 that the settlement is fair, reasonable, and adequate; disclosure of any agreement made in  
 20 connection with the proposed settlement; and opportunities for class members to object. Fed. R.  
 21 Civ. P. 23(e).

22 In determining whether to approve a proposed settlement, courts may consider some or  
 23 all of the following factors: "the strength of plaintiffs' case; the risk, expense, complexity, and  
 24 likely duration of further litigation; the risk of maintaining class action status throughout the  
 25 trial; the amount offered in settlement; the extent of discovery completed, and the stage of the  
 26

1 proceedings; the experience and views of counsel; the presence of a governmental participant;  
2 and the reaction of the class members to the proposed settlement.” *Officers for Justice*, 688  
3 F.2d at 625. The approval of a proposed settlement is within the discretion of the trial court. *Id.*

4 Review of a proposed class action settlement generally involves two stages. *Manual for*  
5 *Complex Litigation*, Federal Judicial Center, §21.632 (4th ed. 2004). First, courts conduct a  
6 preliminary fairness evaluation. At this stage, the judge may seek review of the proposed class  
7 settlement by a court-appointed expert or a settlement master. The purpose of this evaluation is  
8 to determine whether there are reservations about the settlement, such as unduly preferential  
9 treatment of class representatives or certain segments of the class, inadequate compensation or  
10 harms to the class, the need for subclasses, or excessive attorney compensation. *Id.* This stage  
11 affords the parties an opportunity to resume negotiations in an effort to address potential  
12 obstacles to final approval by the court. *Id.*

13 At the second stage, if the proposed class settlement appears sufficiently fair, reasonable,  
14 and adequate, class members are provided notice of a formal Federal Rule 23(e) fairness  
15 hearing. Such notice should inform class members that they will have an opportunity to present  
16 and hear arguments and evidence for and against the terms of the proposed settlement; inform  
17 objectors that they must file written statements of their objections with the clerk of court on or  
18 before a date certain before the fairness hearing; and instruct objectors to provide notice if they  
19 intend to appear at the fairness hearing. *Id.* at §21.633.

20 In this case, the plaintiffs seek preliminary approval of the proposed settlement, approval  
21 of class notice of the proposed settlement, and scheduling of a fairness hearing at which the  
22 Court will decide whether to grant final approval of the settlement and of the attorneys fees  
23 requested. Dkt. 260.

1 **A. PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT**

2       The Court should grant preliminary approval of the proposed settlement. The  
3 information provided to the Court thus far does not raise concerns that the proposed settlement  
4 is unduly preferential to certain class members, includes inadequate compensation or harms to  
5 the class, raises a need for subclasses, or contemplates excessive attorney compensation.  
6 Furthermore, the discovery period is complete, and the Court is familiar with the facts and  
7 posture of the case. Appointment of an expert or a settlement master is not necessary.

8 **B. CLASS NOTICE**

9       The plaintiffs propose providing two forms of notice. The first form would go to class  
10 members who received the initial Class Notice and would not provide an additional opportunity  
11 to opt out of the class. The second form would go to class members who have not yet received  
12 any notice of the class and would provide an opportunity to opt out.

13       A proposed settlement may be rejected on the grounds that it does not afford a second  
14 opportunity for class members to opt out. Fed. R. Civ. P. 23(e)(3) (“In an action previously  
15 certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement  
16 unless it affords a new opportunity to request exclusion to individual class members who had an  
17 earlier opportunity to request exclusion but did not do so.”). Whether to require a second  
18 opportunity to opt out is within the broad discretion of the trial court. *Manual for Complex*  
19 *Litigation, supra*, §21.632 (4th ed. 2004). Class members who have already been afforded an  
20 opportunity to opt out have been informed that they are bound by any settlement or judgment  
21 on the merits. Dkt. 178 at 3. Class members who did not opt out and disagree with the  
22 proposed settlement will have an opportunity to object to the proposed settlement. The Court  
23 therefore concludes that a second opportunity to opt out is not warranted and that approval of  
24 the proposed class notice is proper.

1 **C. FAIRNESS HEARING**

2 Finally, the plaintiffs ask that the Court schedule a fairness hearing for sometime after  
3 September 25, 2007, and propose September 28, 2007. Dkt. 260 at 9. The plaintiffs propose  
4 affording class members forty-five days to file objections.

5 **III. ORDER**

6 Therefore, it is hereby

7 **ORDERED** that Plaintiffs' Motion for (1) Preliminary Approval of the Settlement, (2)  
8 Approval of Class Notice, and (3) a Hearing Date for Final Approval of Settlement (Dkt. 260)  
9 is **GRANTED** as follows:

10 (1) Plaintiffs are hereby **ORDERED** to

11 (a) mail notice to those class members who are listed on Exhibit B (Dkt.  
12 261 at 22) to the Settlement Agreement and who were previously mailed  
13 the Court's first class notice in the form attached as Exhibit B to the  
14 Phillips Declaration (Dkt. 261 at 30) filed in support of the preliminary  
approval motion, and

15 (b) mail notice to those class members who are listed on Exhibit B to the  
16 Settlement Agreement (Dkt. 261 at 22) and who were not previously  
17 mailed the Court's first class notice in the form attached as Exhibit C  
(Dkt. 261 at 33) to the Phillips Declaration.

18 (2) Any objections to the settlement must be submitted in writing to Class  
19 Counsel postmarked by August 15, 2007.

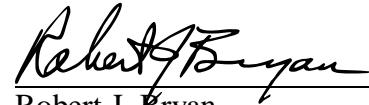
20 (3) Any objector who intends to be heard at the Fairness Hearing must declare  
21 his or her intention in writing to Class Counsel postmarked by August 15, 2007.

22 (4) Any class members who did not receive the Court's first class notice and who  
23 wish to exclude themselves from the class must do so in writing to Class Counsel  
24 postmarked by August 15, 2007.

25 (5) The hearing on the final approval of the settlement and an award of attorney  
26 fees is set for September 28, 2007, at 9:30 a.m. in Courtroom A before Hon.  
Robert J. Bryan.

1 The Clerk of the Court is instructed to send uncertified copies of this Order to all  
2 counsel of record and to any party appearing pro se at said party's last known address.

3 DATED this 27<sup>th</sup> day of June, 2007.

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5 Robert J. Bryan  
6 United States District Judge  
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